

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KHRISTIE REED, et al., on Behalf of
Themselves and All Others Similarly
Situated,

Plaintiffs,

v.

DYNAMIC PET PRODUCTS and
FRICK'S MEAT PRODUCTS, INC.,

Defendants.

Case No.: 15cv987-WQH (DHB)

**ORDER DENYING PLAINTIFFS'
REQUEST FOR EARLY
DISCOVERY CONFERENCE**

[ECF No. 38]

On February 3, 2016, Plaintiffs filed an *ex parte* request for early discovery conference. (ECF No. 38.) Defendants Dynamic Pet Products and Frick's Meat Products, Inc. filed an opposition on February 12, 2016. (ECF No. 41.) For the reasons set forth below, Plaintiffs' request is **DENIED**.

I. BACKGROUND

A. Pleadings

Plaintiff Khristie Reed commenced this consumer protection class action on behalf of herself and others similarly situated by filing a Class Action Complaint ("Complaint") on May 1, 2015. (ECF No. 1.) This initial Complaint contained allegations pertaining to Defendants' manufacture, marketing, and sale of a product called the "Dynamic Pet

1 Products Real Ham Bone For Dogs,” an 8” hickory-smoked pork femur marketed as an
 2 appropriate and safe chew toy for dogs. (ECF No. 1 at ¶ 1.) Plaintiff Reed also alleged
 3 that the Real Ham Bone For Dogs is not, in fact, safe for its intended purpose because,
 4 when chewed, it is prone to splintering into shards which can slice through dogs’ digestive
 5 systems, resulting in “[t]housands of dogs hav[ing] suffered a terrible array of illnesses
 6 including stomach, intestinal and rectal bleeding, vomiting, diarrhea, constipation and
 7 seizures, and hav[ing] died gruesome, bloody deaths.” (*Id.* at ¶ 2.) Plaintiff Reed also
 8 alleged that Defendants have known since at least 2006 that the Real Ham Bone For Dogs
 9 is not safe or appropriate and that thousands of consumers have complained directly to
 10 Defendants about the injuries their pets suffered after chewing the Real Ham Bone For
 11 Dogs.¹ (*Id.* at ¶ 3.) Plaintiff Reed also alleged that in 2010, the Missouri Better Business
 12 Bureau alerted Defendants about the numerous complaints it had received, and the Food
 13 and Drug Administration issued a notice that bones such as the Real Ham Bone For Dogs
 14 are not suitable for dogs. (*Id.* at ¶¶ 3-4.) Plaintiff Reed further alleged that despite knowing
 15 of the dangerous nature of their product, Defendants continued to represent on the product
 16 label, Dynamic’s website, and other marketing materials that the Real Ham Bone For Dogs
 17 is “safe for your pet” and “meant to be chewed.” (*Id.* at ¶ 5.)

18 The initial Complaint sought to certify the following class: “All persons who
 19 purchased one or more Real Ham Bone For Dogs other than for purpose of resale.” (*Id.* at
 20 ¶ 26.) The initial Complaint asserted the following claims for relief: (1) violation of the
 21 California Consumers Legal Remedies Act (“CLRA”), California Civil Code § 1750, *et*
 22 *seq.*; (2) violation of California Business and Professions Code § 17200, *et seq.* (“UCL”);
 23 (3) breach of implied warranty; (4) fraud; and (5) negligent misrepresentation. (ECF No.
 24 1 at ¶¶ 36-82.) The initial Complaint requested general damages, punitive damages,
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27 ¹ The initial Complaint quoted eight alleged online consumer complaints made to
 28 Dynamic since 2006 regarding the dangerous nature of the Real Ham Bone For Dogs.
 (ECF No. 1 at ¶ 16.)

1 restitution, disgorgement, declaratory and injunctive relief, corrective advertising,
 2 attorneys' fees, and costs. (*Id.* at 21:24-22:8.)

3 Defendants filed a motion to dismiss the initial Complaint on June 16, 2015. (ECF
 4 No. 8.) Defendants moved to each of the claims contained in the Complaint. Defendants
 5 also moved to dismiss Plaintiff Reed's declaratory and injunctive relief requests on the
 6 ground that she lacks standing to request declaratory and injunctive relief.

7 On July 30, 2015, the Honorable William Q. Hayes granted Defendants' motion to
 8 dismiss without prejudice as to (1) Plaintiff's requests for restitution and disgorgement
 9 pursuant to the CLRA; (2) Plaintiff's CLRA, UCL, and implied warranty claims to the
 10 extent Plaintiff Reed brings them on behalf of non-California residents; (3) Plaintiff's
 11 implied warranty claim; and (4) Plaintiff's requests for injunctive and declaratory relief.
 12 (ECF No. 18 at 21:1-11.) Judge Hayes denied Defendants' motion to dismiss in all other
 13 respects, and granted Plaintiff leave to file a motion for leave to amend the Complaint. (*Id.*
 14 at 21:12-17.)

15 On September 28, 2015, Plaintiff Reed filed a motion for leave to file a First
 16 Amended Complaint. (ECF No. 22.) Plaintiff Reed attached a proposed First Amended
 17 Class Action Complaint ("FAC") (ECF No. 22-2) which she argued addresses three of the
 18 four claims that Judge Hayes dismissed without prejudice. First, the FAC includes
 19 allegations regarding Plaintiff's compliance with the CLRA's notification requirements.
 20 Second, the FAC limited the California statutory claims to California purchasers, but also
 21 named additional plaintiffs from six additional states (Paul Benesch (Louisiana); Rebecca
 22 Brandel (Florida); Rod and Diane Canutt (Oregon); Rene Lucht (Washington); Diane
 23 Ortman (Illinois); and Kris Vosburgh (New York)), each alleging violation of their
 24 respective consumer protection statutes on behalf of purchasers of the Real Ham Bone For
 25 Dogs in those states. Third, the FAC adds allegations to correct the pleading deficiency
 26 regarding the breach of implied warranty claim. Finally, the FAC "does not include
 27 requests for injunctive or declaratory relief, which the Court dismissed without prejudice
 28 for lack of Article III standing. Plaintiff will instead pursue injunctive relief in a separate

1 state court action.” (ECF No. 22-1 at 2:12-3:2.)

2 On January 5, 2016, over Defendants’ opposition (*see* ECF Nos. 23, 29), Judge
 3 Hayes granted Plaintiff’s motion for leave to file a First Amended Complaint. Plaintiffs
 4 Reed, Benesh, Brandel, Diane Canutt, Rod Canutt, Lucht, Ortman, and Vosburgh filed the
 5 FAC on January 15, 2016. (ECF No. 33.)

6 On January 14, 2016, the parties filed a joint motion to permit Plaintiffs to file an
 7 amended complaint to include a named plaintiff and cause of action for the state of
 8 Minnesota. (ECF No. 32.) Judge Hayes granted the joint motion on January 19, 2016.
 9 (ECF No. 34.)

10 On January 21, 2016, the parties filed a joint motion to permit Plaintiffs to file an
 11 amended complaint to include a named plaintiff and cause of action for the state of North
 12 Carolina. (ECF No. 35.) Judge Hayes granted the joint motion on January 25, 2016. (ECF
 13 No. 36.)

14 On January 26, 2016, Plaintiffs filed the operative Second Amended Class Action
 15 Complaint (“SAC”). (ECF No. 37.) In addition to those Plaintiffs and states named in the
 16 FAC, the SAC adds Plaintiffs Crystal Lewis (North Carolina) and Debra Porwoll
 17 (Minnesota). The SAC contains allegations regarding the dangerous nature of the Real
 18 Ham Bone For Dogs that are substantially similar to those contained in the initial
 19 Complaint and summarized above.

20 **B. Plaintiffs’ Request for Early Discovery Conference**

21 On February 3, 2016, Plaintiffs filed an *ex parte* request for early discovery
 22 conference. (ECF No. 38.) Relying on Local Civil Rule 16.1(c)(1)², Plaintiffs contend
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24² Local Civil Rule 16.1(c)(1) provides, in part:

25 At any time after the filing of a complaint and before an answer has been filed,
 26 counsel for any party may make a request in writing to the judicial officer
 27 assigned to supervise discovery in the case to hold an early neutral evaluation
 28 conference, discovery conference or status/case management conference.
 Copies of the request must be sent to counsel for the parties and the parties

1 that an early discovery conference is appropriate in this case for three reasons. First,
2 Plaintiffs contend that “Defendants continue to sell the product with false and deceptive
3 representations that it is safe for dogs to chew and, as a result, pets are being injured and
4 dying.” (*Id.* at 7:5-7.) Second, Plaintiffs contend that “other than a few new states that
5 have been added and some other readily curable issues, this case has largely survived
6 defendants’ motion to dismiss. The fraud, negligent misrepresentation, UCL and CLRA
7 causes of action are proceeding.” (*Id.* at 7:8-11.) Third, “a discovery conference should
8 be held so the federal and state actions can be coordinated, ensuring these causes are
9 efficiently litigated.” (*Id.* at 7:12-13.)

10 Defendants filed an opposition to Plaintiffs’ request on February 12, 2016. (ECF
11 No. 41.) Defendants respond to Plaintiffs’ arguments by contending, first, that “the
12 operative complaint is far from settled. Defendants just filed a motion to dismiss that could
13 significantly impact the claims and as a result, the scope of discovery.” (*Id.* at 1:23-25.)
14 Second, Defendants contend that an early discovery conference will not help facilitate
15 coordination with the state court action because that action is “is duplicative of this case,
16 [and] the state lawsuit has been stayed in its entirety. Thus, there is no ongoing discovery
17 in that case, and there is no need to coordinate discovery between the two lawsuits.” (*Id.*
18 at 1:26-2:2.) Third, Defendants contend that Plaintiffs’ claim that Defendants continue to
19 make false and deceptive misrepresentations about the Real Ham Bone For Dogs resulting
20 in dogs continuing to be injured “are just unproven allegations in Plaintiff’s complaint,
21 which Defendants obviously deny,” and “Defendants actually get very few customer
22 complaints regarding injuries related to the pet bone at issue, belying Plaintiffs’ claims of
23 a safety issue.” (*Id.* at 2:3-9.)

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26 whose addresses are known to the requesting counsel. Upon receiving such
27 request, the judicial officer will examine the circumstances of the case and the
28 reasons for the request and determine whether any such conference would
assist in the reduction of expense and delay the case. The judicial officer will
hold such conferences as he or she deems appropriate.

1 **C. Defendants' Motion to Dismiss the SAC**

2 On February 9, 2016, Defendants filed a motion to dismiss the Second Amended
 3 Complaint. The motion sets forth several arguments:

4 First, Plaintiff Reed's Breach of Implied Warranty claim is barred because
 5 Plaintiff Reed lacks privity with defendants. Second, Plaintiff Benesch's
 6 claim under Louisiana's consumer protection statute must be dismissed
 7 because the statute expressly prohibits class action claims. Third, the
 8 plaintiffs waived all claims related to the risk of splintering by the bone
 9 product at issue. Fourth, the plaintiffs cannot base their claims on unspecified
 10 alleged misrepresentations on websites or other marking which the plaintiffs
 11 never saw. Fifth, Plaintiff Brandel cannot assert a claim for property damage
 12 under the Florida consumer protection statute. Sixth, plaintiff Rodney
 13 Canutt's claims must be dismissed because of his admission of not reading
 14 the label or purchasing the bone product. Finally, the Second Amended
 15 Complaint fails to identify which remedies are sought under each separate
 16 cause of action.

17 (*Id.* at 1:25-2:7.) Defendants' motion to dismiss is set for hearing before Judge Hayes on
 18 March 14, 2016.

19 **II. ANALYSIS**

20 In accordance with Rule 26(d), discovery generally does not commence until parties
 21 to an action meet and confer as prescribed by Rule 26(f), unless allowed by court order or
 22 agreement of the parties. FED. R. CIV. P. 26(f). A court may permit early discovery if the
 23 requesting party demonstrates good cause. *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208
 24 F.R.D. 273, 276 (N.D. Cal. 2002). "Good cause may be found where the need for expedited
 25 discovery, in consideration of the administration of justice, outweighs the prejudice to the
 26 responding party." *Id.* In determining whether good cause justifies expedited discovery,
 27 courts commonly consider the following factors: "(1) whether a preliminary injunction is
 28 pending; (2) the breadth of the discovery factors; (3) the purpose for requesting the
 expedited discovery; (4) the burden on the defendants to comply with the requests; and
 (5) how far in advance of the typical discovery process the request was made." *Am.
 LegalNet., Inc. v. Davis*, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009); *see also Apple, Inc.*

1 *v. Samsung Elecs. Co., Ltd.*, 768 F. Supp. 2d 1040, 1044 (N.D. Cal. 2011).

2 The Court has considered the factors identified above and find they weigh against
 3 Plaintiffs' request for an early discovery conference. First, no motion for preliminary
 4 injunction is pending, thus weighing against early discovery. Further, although there is a
 5 pending state court action for injunctive relief, that action is stayed.

6 Second, although Plaintiffs request that the Court conduct a discovery conference,
 7 Plaintiffs make no attempt to explain the purpose of the conference or the scope of
 8 discovery they desire to initiate. Without any limits on the matters to be addressed at the
 9 discovery conference or the scope of early discovery there is a real risk that Defendants
 10 would be forced to engage in time-consuming and costly discovery efforts that may not be
 11 necessary or efficient given the matters raised in the pending motion to dismiss. Contrary
 12 to Plaintiffs' assertion, the pleadings are not settled, and the scope of this action could
 13 change significantly depending on the outcome of Defendants' motion to dismiss.
 14 Moreover, even if Plaintiffs attempted to narrow the scope of the early discovery to those
 15 matters not subject to Defendants' motion to dismiss, the Court would view such a
 16 limitation as likely unworkable in practice. Indeed, the Court is concerned that allowing
 17 some discovery now will likely lead to duplicative efforts and potential discovery disputes
 18 between the parties regarding whether certain discovery is or is not impacted by the motion
 19 to dismiss. *See Amylin Pharma., Inc. v. Eli Lilly & Co.*, No 11-CV-1061 JLS (NLS), 2011
 20 U.S. Dist. LEXIS 97725, at *6-7 (S.D. Cal. Aug. 31, 2011) (rejecting plaintiff's argument
 21 for early discovery into certain claims not subject to defendant's motion to dismiss). The
 22 Court concludes that requiring the parties to engage in discovery months before the
 23 pleadings are settled will likely result in duplicative efforts by Defendants and witnesses.

24 Third, the Court is not persuaded by Plaintiffs' claim that further delay will allow
 25 Defendants to continue misrepresenting the safety of their product which, in turn, will
 26 result in more dog injuries and deaths. As Defendants emphasize in their opposition, at
 27 this stage of the case these are unproven allegations. Moreover, Plaintiffs are not seeking
 28 injunctive relief in this case. As such, while in theory there exists the potential that a high

1 damages award could compel Defendants to alter their advertising or even cease
2 manufacturing and selling the Real Ham Bone For Dogs, success in this case is not
3 guaranteed to change Defendants' practices. Thus, moving forward with discovery in this
4 case will not ensure prevention of future dog injuries and deaths.

5 **III. CONCLUSION**

6 For the reasons set forth above, Plaintiffs' *ex parte* request for early discovery
7 conference (ECF No. 38) is **DENIED**.

8 IT IS SO ORDERED.

9 Dated: February 26, 2016



10 DAVID H. BARTICK
11 United States Magistrate Judge
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